BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BILL L. MARKER	)	
Claimant	)	
VS.	)	
	)	Docket No. 199,375
INTERSTATE BRANDS CORPORATION	)	
formerly known as CONTINENTAL BAKING	)	
COMPANY	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INSURANCE COMPANY and	)	
KEMPER INSURANCE COMPANIES	)	
Insurance Carriers	)	

ORDER

Claimant appealed the July 2, 1999 Award entered by Administrative Law Judge Jon L. Frobish. The Appeals Board heard oral argument in Wichita, Kansas, on November 12, 1999.

APPEARANCES

Terry J. Torline of Wichita, Kansas, appeared for the claimant. P. Kelly Donley of Wichita, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for injuries to both knees and back from a series of accidents commencing February 21, 1995, and continuing until claimant's employment with the respondent ended on July 11, 1997. Additionally, claimant alleges that he sustained a specific accident on March 4, 1995, when he slipped on ice.

Judge Frobish found that claimant injured his right knee on March 4, 1995, but that claimant was limited to medical benefits only because he had not missed the prerequisite time from work that was required by K.S.A. 44-501(c). Additionally, the Judge found that claimant failed to prove that the right knee was injured by the alleged series of micro-traumas.

Regarding the left leg, the Judge found a June 20, 1995 date of accident. But the Judge denied claimant permanent partial disability benefits as he failed to prove that he sustained either permanent injury or permanent impairment to that leg.

Regarding the back, the Judge found a July 11, 1997 date of accident. Utilizing the functional impairment rating, and after deducting 2.33 percent for preexisting impairment, the Judge awarded claimant a 4.67 percent permanent partial general disability. In denying the request for work disability, the Judge found that claimant had voluntarily left respondent's employment for higher earnings.

The claimant contends Judge Frobish erred by (1) finding that the date of accident for the right knee was March 4, 1995, instead of finding that he sustained a series of accidents to the right knee through the last day of work on July 11, 1997, (2) finding that the date of accident for the left knee was June 20, 1995, which the Judge determined was the first date of left knee complaints to his doctor, instead of finding that the date of accident for the left knee also was the last day of work for the respondent, (3) reducing the award by preexisting functional impairment to the back when the medical evidence indicates that there was none, and (4) denying the claim for work disability as claimant was allegedly harassed at work and forced to quit his job.

The respondent and its insurance carrier contend that (1) claimant failed to provide timely notice of accidental injuries for the back and left knee and, therefore, should be denied benefits for those injuries; (2) claimant's seven percent functional impairment for the back should be broken down as one-third preexisting the March 4, 1995 accident, one-third for the March 1995 accident, and one-third for the daily aggravation that claimant incurred through the last day of work; and (3) because of K.S.A. 44-501(c), claimant's award should be limited to the 2.33 percent functional impairment that claimant allegedly sustained after March 4, 1995.

The issues before the Appeals Board on this appeal are:

1. What is the appropriate date or dates of accident for claimant's alleged injuries?

2. Did claimant provide timely notice of his accidental injuries?

3. If so, what is the nature and extent of claimant's injury and disability?

4. Does K.S.A. 44-501(c) preclude claimant from receiving permanent partial general disability benefits for any of his injuries?

5. If claimant is entitled to receive permanent partial general disability benefits, what is the appropriate reduction for preexisting impairment?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. Mr. Bill L. Marker began working as a route salesman for Continental Baking Company (Continental) in February 1994. Before beginning that job, the company required Mr. Marker to take a physical, which he passed. Although Mr. Marker had previously injured his back and had two operations on his right knee, the doctor who performed the physical did not place any medical restrictions on him.

2. In January 1995, Dr. Anthony G. A. Pollock operated on Mr. Marker's right knee, the knee that two other doctors had previously operated – the first surgery being performed in the 1980s and the second surgery being performed in the early 1990s. After recuperating from Dr. Pollock's surgery, Mr. Marker was released to return to work as of February 21, 1995.

3. On March 4, 1995, Mr. Marker slipped on some ice while delivering product to McConnell Air Force Base. In that fall, Mr. Marker hurt his right knee. Within two or three days of the fall, Mr. Marker told his supervisor, Mr. Dennis Copp, about the accident and was sent to the company doctor. On March 15, 1995, Mr. Marker saw Dr. Wilson of the Broadway Occupational Medicine Clinic, and was diagnosed as having a right knee strain and was released back to work.

4. On March 13, 1995, Mr. Marker filed an Application for Hearing with the Division of Workers Compensation alleging that commencing February 21, 1995, he had injured "both knees and all body parts affected" by performing his regular work duties.

5. In May 1995, Mr. Marker went to preliminary hearing requesting that Dr. Pollock be authorized to treat both of his knees and back. At the preliminary hearing, Mr. Marker attributed the left knee symptoms to driving the bread truck and attributed his back symptoms to pushing heavy bread racks at work.

6. In July 1995, Continental either merged with or was purchased by Interstate Brands (Interstate). But that change did not affect Mr. Marker's job.

7. As indicated above, Dr. Pollock operated on Mr. Marker's right knee in January 1995 and released him to return to regular work without restrictions as of February 21, 1995. After that release, Dr. Pollock did not see Mr. Marker again until June 20, 1995, at which

time he was complaining of back pain that he related to pushing and pulling bread carts. On that date, Mr. Marker also told Dr. Pollock that he had recently fallen and had re-injured his knees. The doctor found the left knee swollen and prescribed anti-inflammatory medication. The record is unclear whether the fall mentioned in the doctor's June 1995 notes refers to the March 4, 1995 fall at McConnell Air Force Base or a different incident. The first time that Mr. Marker complained to Dr. Pollock of either back or left knee pain was at the June 20, 1995 visit.

8. From June through November 1995, Mr. Marker returned to Dr. Pollock on three more occasions with complaints of right knee pain, left knee swelling, and back pain. At the November 22, 1995 visit, Mr. Marker continued to relate his back complaints to struggling with the bread carts at work. After that visit, Dr. Pollock wrote the company's insurance carrier and recommended that the bread carts be repaired in order to avoid re-exacerbating Mr. Marker's spine. In a letter to the company's insurance carrier dated November 28, 1995, the doctor wrote:

> I am continuing to see Bill Marker because of continued episodes of pain in his back which Mr. Marker attributes to the fact that he has to struggle with poorly maintained equipment at Continental Baking. His main contention is that he has to unload carts that are filled with bread and, therefore, fairly heavy, but these carts have damaged wheels which cause the cart not to run or roll smoothly. Because of this he has to struggle with these and this puts persistent stress and strain on his spine which re-exacerbates the pain that he has. . . .

9. At some point in time after November 22, 1995, the exact date being unknown, the company modified Mr. Marker's job and moved him from the bread route to a cake route. After that change, Mr. Marker no longer had to work with the bread racks. But he continued to stock product and continued to experience symptoms in his knees and back.

10. Mr. Marker continued to work as a route salesman for Interstate and continued to experience pain in his back and in both knees. At the March 1999 regular hearing, Mr. Marker attributed those symptoms to his work. In preliminary hearing exhibits that the parties stipulated into evidence at the regular hearing, the company described Mr. Marker's job as a route sales representative as follows:

> . . . His job is route sales rep. His job includes frequent lifting, pulling, pushing, twisting, walking, stooping, kneeling, and driving a stick-shift van. He makes approx. 25-30 stores per day, getting in and out of his truck 3-4 times per store. He stocks shelves of varying heights requiring bending, stooping, and kneeling at each store.

11. After November 1995, Mr. Marker did not see Dr. Pollock again until May 1996 when he complained of swelling in his right knee. In April 1997, Mr. Marker again returned to see

Dr. Pollock. The doctor has no record that Mr. Marker complained of his back at either of those two visits.

12. Mr. Marker continued to work for Interstate until July 11, 1997, when he quit to work as an independent contractor for Roadway Package Systems. In that business activity, Mr. Marker delivers and picks up packages.

13. Using the fourth edition of the AMA *Guides to the Evaluation of Permanent Impairment* (*Guides*), Dr. Pollock determined that Mr. Marker sustained a seven percent whole body functional impairment due to his back injury from pushing the heavy bread carts at Continental and Interstate. In his July 7, 1998 letter to attorney Terry J. Torline, the doctor wrote, in part:

> With regard to your questions concerning his back problems, we know that he has had back trouble since June 20, 1995, when he first complained about it, at which time I found that he had significant narrowing at the L5-S1 disc space, which is certainly consistent with his symptoms and which I addressed in a letter to Scott Stephan, with Travelers in November of 1995. In that letter, I expressed my feelings that his continued work with mechanically unsound carts more likely than not, aggravated his low back pain.
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> With regard to a rating in this manner, he would fall under the Category II, Subcategory C on operated [sic] medically documented injury with a minimum of six months of documented pain, spasm and rigidity with moderate to severe degenerative changes on his x-rays. This would give him a 7% impairment rating to the whole person.

Additionally, the doctor found that Mr. Marker had sustained an additional one to two percent increase in the functional impairment in his right lower extremity as a result of the work that he performed for Continental and Interstate. The doctor did not attribute any impairment that may exist in Mr. Marker's left knee to his work for Continental or Interstate.

14. At his deposition, Dr. Pollock testified that Mr. Marker aggravated his back by working with the unwieldy bread racks. The doctor testified as follows:

> Q. (Mr. Torline) So was it your opinion that performing or engaging in this activity of using these bread carts with the squirrelly wheels was aggravating his low back condition?
>
> A. (Dr. Pollock) Yes, I thought so and I thought that they should try to correct it but -- I did suggest perhaps it is possible I wasn't getting an accurate story, but I believed Mr. Marker at the time.

> Q. Would it surprise you, doctor, if shortly after your letter they switched jobs and he no longer had to push and pull these bread carts around?
>
> A. I would not be surprised at all, it was such a devastating letter.
>
> Q. Well, what about this activity of pushing and pulling the carts did you find that was causing his problems?
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> A. I think he has degenerative disk, and these carts I imagine are tall carts loaded with bread and he has to push these, and I am sure it is like pushing a shopping cart with a bad wheel, that it is just difficult. It is awkward. You have to struggle to prevent them falling over, especially on the dock. And somebody that has got a bad back I think mechanically is at a disadvantage trying to handle these unwieldy carts.
>
> . . .
>
> Q. (Mr. Donley) Doctor, did Mr. Marker ever indicate to you that he needed restrictions to perform his job duties?
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> A. (Dr. Pollock) No, actually I was looking at my return to work slip and no restrictions written, so I am just -- I suppose I assumed if we could get this cart business fixed, that would be -- everything would be okay.

When asked if he would be surprised that Mr. Marker testified that stocking shelves caused him problems with both his back and knees, the doctor stated that he was sure that activity would irritate the degenerative arthritis in Mr. Marker's knees. But the doctor did not comment about how those activities would affect the back.

15. Although a good portion of Dr. Pollock's testimony indicates that it was working with the bread racks that injured Mr. Marker's back, the doctor also testified that the seven percent functional impairment rating that he gave Mr. Marker for his back condition should be divided one-third for preexisting degenerative condition, one-third for the March 1995 accident, and one-third for the daily aggravation that Mr. Marker sustained through his last day of work. The doctor testified:

> Q. (Mr. Donley) Okay. In the course of doing that, my letter confirmed our conference. The letter indicates that the 7 percent impairment should be divided one-third attributable to the preexisting degenerative condition of the back, one-third to the slip and fall on the black ice of March 4 of 1995 and one-third to the continuing daily aggravations that this gentleman suffered up through his last day of employment.
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> A. (Dr. Pollock) Yes.

Q. Is that correct?

A. That is what I said, yes.

Q. Is there anything that you have testified to or any questions Mr. Torline has asked you today that has caused you to change your opinions in any way?

A. I don't believe so.

But that testimony must be considered in light of Dr. Pollock's other testimony that Mr. Marker did not complain of back pain when the doctor first saw him in November 1994 and, without symptoms, the AMA *Guides* would not rate him as having an impairment.

16. The Appeals Board recognizes that Dr. Pollock's opinions are not consistent. But based upon the greater weight of the evidence, the Appeals Board finds that Mr. Marker injured his back pushing the heavy bread carts through the date that Interstate modified his job and eliminated that activity. The evidence does not establish that stocking shelves caused or contributed to the back injury. Likewise, the record fails to establish the date that the bread racks were eliminated from Mr. Marker's job but it appears that Mr. Marker's job was modified sometime after Dr. Pollock's November 28, 1995 letter. Therefore, the Appeals Board selects December 1, 1995, as the approximate date of that job accommodation and as the date of accident for the back injury.

17. The Appeals Board finds that Mr. Marker permanently aggravated the right knee and has sustained an additional one and one-half percent functional impairment as a result of the work that he performed for Continental and Interstate but that he has failed to prove that he sustained either permanent injury or permanent impairment to the left knee. Those findings are based upon Dr. Pollock's testimony and records. The Appeals Board finds that both the right and left knees sustained a series of micro-traumas through Mr. Marker's last day of work on July 11, 1997, as the activity that caused and aggravated the knee injuries was the stooping and squatting that Mr. Marker did to stock shelves.

18. The Appeals Board finds that the record fails to prove that Mr. Marker had a preexisting impairment to his back before this work-related injury. The evidence is uncontroverted that Mr. Marker's back was asymptomatic before he began injuring it by working with the heavy bread racks. And according to Dr. Pollock, the AMA *Guides* do not assign an impairment rating for an asymptomatic back.

19. The Appeals Board affirms the Judge's finding that it is more probably true than not that Mr. Marker voluntarily terminated his job at Interstate to pursue other interests. Mr. Marker's allegations that the company was harassing him or that his injuries forced him to quit have not been established.

20. As early as the March 1995 Application for Hearing, Continental had notice that Mr. Marker was claiming work-related injuries to both knees. As early as the May 1995 preliminary hearing, Continental had notice that Mr. Marker was claiming benefits for injuries to his back.

CONCLUSIONS OF LAW

1. The Award should be modified to grant Mr. Marker benefits for a seven percent permanent partial general disability for the injury to his back and benefits for a one and one-half percent permanent partial disability to the right lower extremity.

2. In *Treaster*,[1] the Kansas Supreme Court recently indicated that the appropriate date of accident for injuries that develop because of repetitive micro-traumas (which this is) is the last date that a worker performs services or work for the employer or is unable to continue a particular job and moves to an accommodated position. *Treaster* can also be interpreted as focusing upon the offending work activity that caused the worker's injury as it holds that the appropriate date of accident for a repetitive use injury can be the last date that the worker performed his or her work duties before being moved to a substantially different accommodated position.

> Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.[2]
>
> Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.[3]

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[1] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

[2] *Treaster*, syl. 3.

[3] *Treaster,* syl. 4.

In *Treaster*, the Kansas Supreme Court also approved the principles set forth in *Berry*,[4] in which the Court of Appeals held that the date of accident for a repetitive trauma injury is the last day worked when the worker leaves work because of the injury.

3. Mr. Marker continued to injure his back for that period while he worked with the bread racks. Once Interstate removed the bread racks from his job, the micro-traumas to the back ceased. Therefore, *Treaster* applies and the date of accident is the date that Interstate eliminated the bread racks from Mr. Marker's job. That modification constituted a substantial change in Mr. Marker's job duties, which the Appeals Board finds occurred on or about December 1, 1995.

4. Because Mr. Marker continued to sustain micro-traumas to both his knees when he stocked shelves, which he did through his last day of work for Interstate on July 11, 1997, that date is the appropriate date of accident for the right and left knee injuries.

5. The company has raised timely notice of the accidental injuries as an issue in this case. The Workers Compensation Act requires workers to give notice of their accident or injury within ten days of when it occurred. But that ten-day period may be extended to 75 days if the worker can prove that the failure to notify the employer within the initial ten-day period was due to just cause. And the employer's actual knowledge of the accident or injury renders the giving of such notice unnecessary.[5]

6. Mr. Marker provided to his supervisor timely notice of the March 1995 accident. Additionally, Mr. Marker provided notice to the company as early as March 1995 and May 1995 that he was claiming injuries to both knees and back. The notice of injury was timely as it was actually given during the period that Mr. Marker was sustaining the micro-traumas to his knees and back. The Appeals Board concludes that Mr. Marker provided timely notice of all the accidental injuries alleged in this claim.

7. Because Mr. Marker's back injury is an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 44-510e. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the

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[4] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[5] K.S.A. 44-520.

> injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[6] and *Copeland*.[7] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption of having no work disability as contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e, that workers' post-injury wages should be based upon their ability rather than their actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[8]

8. Because Mr. Marker voluntarily left his job at Interstate for what he believed was a more lucrative business opportunity as an independent contractor, Mr. Marker's permanent partial general disability for his back is limited to his seven percent whole body functional impairment rating.

9. Mr. Marker sustained an additional one and one-half percent functional impairment to his right leg as the result of his work-related injury. Therefore, Mr. Marker is entitled to receive a second award for the accidental injury to the right knee.

10. Nothing should be deducted for preexisting functional impairment from either award. As indicated in the findings above, before he injured his back by working with the bread racks, Mr. Marker's back would not have supported a rating according to the AMA *Guides.* Therefore, there is no preexisting functional impairment to be deducted in the award for the back injury. Regarding the right knee injury, the preexisting functional impairment has already been deducted as the one and one-half percent functional impairment is the

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[6] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[7] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[8] *Copeland*, p. 320.

amount of functional impairment that Mr. Marker sustained to his leg over and above that which existed before the accident. Therefore, the award for the right knee injury should not be further reduced.

11. Because the back injury prevented Mr. Marker from performing his regular job as a bread route salesman, he has been disabled for more than one week from the *work at which the employee is employed.* Therefore, K.S.A. 44-501(c) does not limit Mr. Marker's benefits for the back injury to medical benefits only. Because that statute was amended on April 4, 1996, to eliminate the requirement that a worker must be disabled for a period of at least one week from earning full wages before being eligible to receive permanent partial disability benefits, the statute does not affect Mr. Marker's right to receive permanent partial disability benefits for the right knee injury.

AWARD

WHEREFORE, the Appeals Board modifies the July 2, 1999 Award, as follows:

Award #1

Bill L. Marker is granted compensation from Interstate Brands Corporation and its insurance carrier for a December 1, 1995 accidental injury to the back and resulting disability. Based upon an average weekly wage of $787.56, Mr. Marker is entitled to receive 29.05 weeks of benefits at $326 per week, or a total of $9,470.30, for a seven percent permanent partial general disability.

As of February 2, 2000, there is due and owing to the claimant 29.05 weeks of permanent partial general disability compensation at $326 per week in the sum of $9,470.30 for a total due and owing of $9,470.30, which is ordered paid in one lump sum less any amounts previously paid.

Award #2

Bill L. Marker is granted compensation from Interstate Brands Corporation and its insurance carrier for a July 11, 1997 accidental injury to the right knee and resulting disability. Based upon an average weekly wage of $787.56, Mr. Marker is entitled to receive 3 weeks of permanent partial disability benefits at $351 per week, or a total of $1,053, for a one and one-half percent permanent partial disability.

As of February 2, 2000, there is due and owing to the claimant 3 weeks of permanent partial disability compensation at $351 per week in the sum of $1,053 for a total due and owing of $1,053, which is ordered paid in one lump sum less any amounts previously paid.

The Appeals Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of February 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Terry J. Torline, Wichita, KS
P. Kelly Donley, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director